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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1098

LUIZ GOMEZ ORTEGA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 72-1103

JEAN ORSINI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 11, 1972. Mr. Justice Marshall extended the time for filing petitions for writs of certiorari to

February 9, 1973. On February 8, 1973 (No. 72-1098) and February 9, 1973 (No. 72-1103) the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court properly held that the government was not required to divulge the identity and whereabouts of an informant.

2. Whether search of a car, hotel room and apartment violated petitioners' Fourth Amendment rights.

3. Whether the prosecutor failed to keep an alleged agreement with defense counsel.

4. Whether the district court properly admitted a false exculpatory statement made by petitioner Orsini after his arrest.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners and one Perez were convicted as charged on two counts of having conspired to import, distribute, and to possess heroin with intent to distribute it and having distributed and possessed with intent to distribute heroin in violation of 21 U.S.C. 846 and 841 (b)(1)(A). Petitioner Ortega was sentenced to ten years' imprisonment on Count One and fifteen years' imprisonment on Count Two, the sentences to run consecutively, and was fined $35,000. Petitioner Orsini was sentenced to fifteen years' imprisonment on Count One and ten years' imprisonment on Count Two, the

sentences to run consecutively, and was fined $35,000. The court of appeals affirmed (Pet. App. A).[1]

The facts in this case have been detailed in the comprehensive opinion below (Pet. App. A2–13). Briefly, evidence at trial revealed that the relevant events commenced with a series of meetings in France in August and September 1971, wherein one Etienne Mosca, a Frenchman, persuaded co-defendant Gunther,[2] also a Frenchman, to go to New York and bring back a large quantity of currency which he was to smuggle into France and deliver to Mosca (Tr. 54, 58–63, 65–72, 74–77). Mosca gave Gunther elaborate instructions about meeting two men in New York, the first of whom, a blond, thirty-five year old man, would give Gunther a claim ticket for a parked car on September 16, 1971 (Tr. 66–67). Unknown to both Mosca and Gunther, this contact man, whom Gunther had never seen before, was also serving as an informant for the Bureau of Narcotics and Dangerous Drugs (Tr. 158, 166–167). After receiving the claim ticket from the blond man, Gunther was to meet the second man, subsequently identified as petitioner Orsini, on two occasions. At the first meeting on September 17, 1971, Gunther was instructed to hand Orsini the claim ticket and arrange a subequent meeting, no later than September 19, at which Orsini would

[1] "Pet. App. A" refers to the appendix of Orsini's petition.

[2] Gunther pleaded guilty to one of the counts in the indictment and testified as a government witness at petitioners' trial.

give Gunther the currency he was to deliver to Mosca at Orly Airport, Paris (Tr. 68–72). In addition to instructing Gunther in minute detail about these forthcoming meetings and supplying Gunther with expense money and the necessary equipment, Mosca also demonstrated for Gunther the correct procedure for hiding the currency in the false bottom of one of the suitcases Mosca provided (Tr. 71, 75–77).

Meanwhile, in England, the informant (hereinafter referred to by his code name "Festus") on August 3, 1971, purchased a Jaguar sports car (Govt. Exhibit 5, S. Tr. 339–340, 349; Tr. 278, 511, 927).[3] An agent of the Bureau of Narcotics and Dangerous Drugs saw Festus buy the Jaguar but the government neither instructed Festus to purchase the car nor furnished money for him to do so (Tr. 927). On September 10, 1971, the Jaguar, with 93½ kilos of heroin concealed in it,[4] was shipped under Festus' name aboard the Queen Elizabeth, which arrived in New York on September 15, 1971 (Tr. 266–268). Upon its arrival in New York, the Jaguar was inspected in the hold of the Queen Elizabeth by customs officers, who had been

[3] "S. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript. A copy of the entire transcript has been lodged with the Clerk of this Court.

[4] Petitioner Ortega's contention (Ortega Pet. 4) that Festus "loaded [the Jaguar] with 93[½] kilograms of heroin" is unsupported by the record. On the contrary, the government's representations in accord with *Brady* v. *Maryland*, 373 U.S. 83, and the court's *in camera* inspection of information about Festus' role in that heroin transaction establish that Festus did not purchase the heroin or load it into the Jaguar (Tr. 295, 316, 404, 415, 461).

alerted by BNDD agents. One of the 180 bags of heroin was removed and subsequently examined (Tr. 258–261; 267–270, 274). After Festus drove the Jaguar from the pier, the car was under continuous surveillance by BNDD agents. Late in the evening of September 15, 1971, BNDD agents, with the knowledge and consent of Festus, dismantled the Jaguar and removed 179 bags of heroin, which they replaced with identical bags of lactose except for one bag of heroin they initialed and left in the car. The agents then reassembled the Jaguar (S. Tr. 339; Tr. 374–378, 496–505).

On the following days, Gunther, pursuant to his instructions from Mosca, obtained the parking claim ticket from Festus, passed the ticket to petitioner Orsini and arranged to meet again with Orsini to obtain the currency from him (Tr. 84–87, 94–102). Orsini, after receiving the claim ticket from Gunther, contacted petitioner Ortega and co-defendant Perez.[5] At 12:20 a.m. on September 19, 1971, Ortega presented the claim ticket at the garage where the Jaguar was parked. He drove the Jaguar from the garage, followed immediately by Orsini and Perez in a separate car. A few blocks from the garage the Jaguar stalled. Petitioners and Perez were arrested as they tried to restart the car (Tr. 597–599, 612–622, 776–784). Among the items seized from Orsini were a diagram of the Jaguar which pinpointed the location of the 180 bags of heroin, and various instructions in

[5] The meetings between Orsini, Ortega and Perez are described in the opinion below (Pet. App. A7–12).

French as to how to remove the heroin from the car and how to recognize Gunther (Govt. Exhibits 25-27, Tr. 799–802, 807–812).

Later in the day search warrants were executed for Orsini's hotel room and Perez' apartment. At the apartment, agents found and seized a 25 pound scale (Tr. 344–347, 390–392). At 1:50 p.m. the following day, Monday, September 20, 1971, Orsini was interviewed by an Assistant United States Attorney prior to his arraignment at 4:00 p.m. Orsini claimed his name was Huguen and denied riding in a car the evening of his arrest (Tr. 828–829, 835–837, 842–846).

## ARGUMENT

1. Petitioners contend that the government's refusal to disclose Festus' true identity and whereabouts deprived them of information which might have helped them establish an entrapment defense. Petitioner Orsini contends that, although he had been a willing participant in a venture which he knew to be illegal (Pet. 25), the disclosure of the informant could have helped him establish the traditional entrapment defense because "his trip to the United States was triggered by a meeting with a man who fit the general description available of the informer" (Pet. 10).[6] This claim, which was made by Orsini's counsel and never verified under oath by petitioner who put in no defense or affidavit in support of his claim, does not even approach the showing necessary to establish

[6] Orsini's counsel admitted at trial that the man with whom petitioner met did not quite fit the description of the informant, since he did not have the same hair color (Tr. 210–211).

an entrapment defense either under the traditional standards, set out in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, or under the "new entrapment defense" suggested by some recent lower court decisions, and relied upon by both petitioners (Orsini Pet. 9–18; Ortega Pet. 7–14). The court of appeals properly rejected these claims.

### A. THE TRADITIONAL DEFENSE

Under the traditional entrapment defense, it is not enough that an informer or undercover agent aided the defendant in the commission of the crime; rather it must be shown that he 'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States,* 287 U.S. 435, 442; *Sherman* v. *United States,* 356 U.S. 369. Petitioner Orsini offered to show only that he met "with someone [possibly the informant] prior to coming to this country and it was from that someone that he received [the] instructions" (Tr. 288) which he followed when he arrived in the United States. But even if the informant was that "someone," there is no basis in the offer of proof for the claim that Orsini, who admits that he knowingly entered upon illicit activity (Pet. 25), was an "innocent person" in whose mind had been planted the disposition to commit the offense.[7] Moreover, as the court of appeals observed, "it

[7] Petitioner Ortega claimed that the informant would testify that he (Ortega) and a co-defendant Perez, "were unknown to the importer-informant" (Ortega Pet. 9). Clearly in these circumstances there is not the slightest basis for the traditional or the "new" entrapment defense. See *e.g.*, *United States* v. *Sanchez*, 440

is clear beyond peradventure of doubt, as demonstrated by what each of these appellants did to effectuate the purposes of the conspiracy, as outlined in our statement of the evidence, that each of these appellants was ready, willing and able and had a prior propensity to engage in a heroin importation and distribution venture" (Orsini Pet. App. A15).

B. THE "NEW ENTRAPMENT DEFENSE"

Petitioners, relying principally upon *United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted, 409 U.S. 911, argued February 27, 1973, also claim that the presence of the informant would have helped them establish a defense based solely on the activity of the informant—regardless of their obvious criminal propensity. But as the court of appeals here found, *Russell* and similar cases, whether correctly decided or not, only stand for the limited proposition that where the government "provides not only the occasion for committing the offense but also the contraband necessary for its consummation [there may] be entrapment as a matter of law, irrespective of the propensity of the accused to commit the crime" (Orsini Pet. App. 15).

Here the informant did no more than act as a "conduit" in transferring the heroin from its illicit source to petitioner. Such conduct by government

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F. 2d 649 (C.A. 9); *United States* v. *Jenkins*, 470 F. 2d 1061, 1063 (C.A. 9), certiorari denied, April 2, 1973 (No. 72-995). Moreover, since it was never alleged that the informant knew Ortega or Perez it is difficult to determine how the presence of the informant would have aided their defense.

agents has repeatedly been recognized as a proper investigatory tactic. See *e.g., Chapman* v. *United States,* 443 F. 2d 917 (C.A. 10); *United States* v. *Beckley,* 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Davis,* 272 F. 2d 149 (C.A. 7); *United States* v. *Sohnen,* 298 F. Supp. 51 (E.D.N.Y.).

Since it was stipulated that the informant purchased the Jaguar, although not with government funds, and that the informant transported the heroin ladened vehicle into the United States with the knowledge and acquiesence of the government (Tr. 927), and since the district court determined that the heroin was not supplied by the government,[8] it is plain that the availability of the informant could not have added anything further that could have possibly aided petitioners' "defense." The district court thus properly refused, after an *in camera* hearing, to endanger his

[8] The district court conducted an *in camera* proceeding with the consent of petitioners to determine whether the conduct of the informant came within the ambit of the "new entrapment" cases. After examining materials provided by the United States Attorney, the district court stated (Tr. 415–416):

"THE COURT. I have explored this matter explicitly from materials in the possession of the government and have satisfied myself that the Bueno situation [*United States* v. *Bueno,* 447 F. 2d 903 (C.A. 5)] is not the situation which we face here.

Just so you might be perfectly clear, I mean that I have inquired into the question of the informant's involvement in terms of any dealing with the heroin or any loading of the heroin into the vehicle and all of those various points which you have raised."

Following these findings, there were no further motions to disclose the informant's identity (Pet. App. A18).

life by requiring the divulgence of his whereabouts or insisting on his presence at trial.[9]

We direct the attention of the Court, however, to the recent *per curiam* opinion of the Court of Appeals for the Ninth Circuit in *United States* v. *Knight*, C.A. 9, No. 72–2031, decided October 16, 1972, pending on the government's petition for certiorari (No. 72–965), which seems to go beyond *Russell*, and suggests that in the Ninth Circuit's view some activity falling short of actually supplying contraband may suffice to give rise to the "new entrapment defense." There, as here, an informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. The Ninth Circuit summarily affirmed the suppression of evidence, citing *Russell* and several similar cases, but without discussion. The petition for certiorari filed by the United States cited an apparent conflict between the holding in *Knight* and the holding in the instant case as a basis for granting the petition for review (Pet. 10–13).

We adhere to the view that this case was correctly decided by the court of appeals, and that the decision below is in accord with the well-settled law. Indeed, in *United States* v. *Jenkins*, 470 F. 2d 1061 (C.A. 9), certiorari denied, April 2, 1973 (No. 72–995), the Ninth Circuit without citing its earlier decision in *Knight* held that the "new entrapment defense" which it had

[9] This case illustrates the danger of revealing the identity and whereabouts of informants, since the Jencks Act statements of the principal witness, Gunther (proferred to the defense in accord with 18 U.S.C. 3500) reveals that petitioners threatened Gunther or his family with death if he cooperated with the government (Tr. 243–252).

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created in *Russell* was inapplicable unless it is shown that the defendants were "induced" by the informant to commit the offense (470 F. 2d at 1063). There is no claim here that either petitioner was anything but a willing participant in an international heroin smuggling ring.[10] The Court may, however, wish to defer action on the petitions here, pending the disposition of the petition in *Knight*.

2. Petitioners also contend that the search of the Jaguar, of Orsini's hotel room, and of Perez' apartment violated their Fourth Amendment rights, that the prosecutor failed to keep an alleged agreement made with defense counsel, and that Orsini's exculpatory statement two hours before arraignment was obtained in violation of *McNabb-Mallory*. These contentions were thoroughly considered and properly rejected by the court below (Pet. App. A19–A27), upon whose opinion we rely.[11]

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[10] Moreover, we note that petitioners' activities were sufficient to justify their conviction on the conspiracy count (Count I), even under the new entrapment defense upon which they rely, regardless of the effect that the subsequent activities of the informant might have on the substantive count here (Count II). See *United States* v. *McGrath*, 468 F. 2d 1027, 1031 (C.A. 7), petition for certiorari pending (No. 72–761); *United States* v. *Chisum*, 312 F. Supp. 1307, 1312 (C.D. Calif.); cf. *United States* v. *Basey*, 468 F. 2d 194, 195–196 (C.A. 9), petition for certiorari pending (No. 72–786). But since petitioners received consecutive sentences on both counts, this is not a case where the concurrent sentence doctrine would be appropriate.

[11] We would only add that petitioner Orsini's reliance on *United States* v. *Case*, 435 F. 2d 766 (C.A. 7), in support of his claim that "a person is entitled to reasonable expectations of privacy within his hotel room * * * [from] *non-electronic* eaves-

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CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*
HENRY E. PETERSEN,
*Assistant Attorney General.*
JEROME M. FEIT,
PETER M. SHANNON, Jr.,
*Attorneys.*

APRIL 1973.

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dropping, from corridors or adjoining rooms" (Pet. 27, emphasis added), fails to note that the Seventh Circuit has limited *Cox* to its facts, and held that it applied only where the law enforcement officers listened to conversation while stationed "in a place where they had no right to be" (*United States* v. *Hanahan*, 422 F. 2d 649, 653 (C.A. 7)). Here, of course, the law enforcement officers had a legal right to be in the adjoining hotel room which they rented.